



NATURAL RESOURCES DEFENSE COUNCIL

December 16, 2010

The Honorable Lisa P. Jackson
Administrator
U. S. Environmental Protection Agency
Water Docket, Mailcode: 28221T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Chesapeake Bay TMDL -- Docket no. EPA-R03-OW-2010-0736

Dear Administrator Jackson:

On behalf of its members who reside and recreate in the Chesapeake Bay watershed, NRDC respectfully submits these additional comments related to the Environmental Protection Agency's (EPA) Draft Chesapeake Bay Total Maximum Daily Load (TMDL). 75 Fed. Reg. 57776, *et seq.* The Natural Resources Defense Council (NRDC) is a national nonprofit environmental organization with 1.3 million members and online activists. NRDC uses law, science and the support of its members to safeguard the Earth: its people, its plants and animals, and the natural systems on which all life depends. One of NRDC's priorities is to protect and restore the integrity of water systems that sustain and benefit its members. As part of its efforts to achieve this goal, NRDC has undertaken a wide range of activities to stem water pollution from numerous sources. NRDC has engaged in advocacy with executive and legislative branch officials, has produced material for public education, and has participated in litigation, all to promote better regulation of water pollution.

On November 9 NRDC submitted formal comments on the TMDL which included references to draft state Watershed Implementation Plans (WIPs). Several of NRDC's comments relate specifically to the adequacy of state plans and the Agency's responsibilities for issuing guidance that helps states achieve reasonable assurance standards. Over the past month, the Bay states have submitted revised WIPs to be referenced in EPA's final TMDL. We are hereby submitting additional comments on the newly revised WIPs as they relate to the forthcoming final TMDL.

Throughout the TMDL process, EPA has worked hard with Bay States to grant them an appropriate amount of deference in how they achieve the TMDL's pollution load reductions. Some measure of deference is indeed appropriate, given the need for flexible responses to local conditions. However, EPA is ultimately responsible for ensuring that state WIPs achieve meaningful results. EPA must ensure that each state's WIP provides "a reasonable assurance of implementation," demonstrating that sufficient current or anticipated resources and commitments are in place to achieve the load reductions required by the TMDL.

Based on a review of the final submitted state WIPs, NRDC has concluded that, while generally much improved, critical elements of the plans still do not meet the reasonable assurance standard. EPA cannot accept, as “reasonable assurance,” WIPs that lack specific binding commitments and other structures to assure that adequate funding, policies, and regulations are in place to assure that load reductions will be achieved. We urge the agency to continue to work with the Bay jurisdictions to make additional improvements and to publish backstop provisions to protect water quality in the final TMDL.

Improved State WIPs Still Lack Necessary Assurances And Require EPA Oversight

All Bay states with the exception of New York have now submitted substantially improved, final WIPs. These documents generally reflect careful review of the Agency’s initial feedback and incorporate extensive public comment and recommendations at the state level. For example, Maryland’s WIP notes that they received 113 individual sets of comments, 100 emails, 100 letters from students and parents, and two petitions with a total of over 1000 citizen signatures. In most instances, the plans provide much greater transparency and specificity with regard to the plans, programs, and policies that will be implemented to achieve load reductions. However, in several places, these programs reflect either a timeline for implementation that does not match historical pace of permitting activity (MD and PA), funding requirements that are not assured (PA), dependence on voluntary programs that may prove difficult to enforce (WV), or heavy reliance on offset programs that are either newly formed or that still require legislative action (VA and PA). Some level of uncertainty will always remain under a delegated program and inclusion of milestones to assess progress is an important overall TMDL element. While absolute assurance will never be guaranteed, the lack of specificity remaining in the plans requires EPA to ensure that states meet their TMDL allocations by being prepared to issue, to the degree required in each state, the backstop TMDLs that the Agency announced in November. In addition, EPA must stand by its commitment to invoke the discretionary responses it outlined in the Agency’s December 29, 2009 “Consequences Letter.”¹ In particular, EPA must exercise its authority to object to NPDES permits that fail to incorporate sufficiently stringent WQBELs in order to maintain consistent attainment of WLAs across the watershed.

All of the WIPs still suffer from a lack of specific detail or commitment to filling gaps between the allocations and current loads. This is particularly, and disturbingly, true for state-led programs intended to achieve reductions from agricultural, urban stormwater, and on-site treatment (septic) loads. No state was able to firmly and satisfactorily demonstrate a strategy to address gaps in funding for voluntary BMPs, technical assistance, or compliance/oversight programs. Despite assurances of widespread adoption of nutrient management planning (NMP) on AFO/CAFOs throughout the watershed, most states were unable to provide assurances of such high levels or outline mechanisms for updating NMP standards to reflect contemporary, federal best practices. Most states again failed to identify or create binding and enforceable

¹ See Letter from Shawn Garvin, EPA Region 3 Administrator to Hon. L. Preston Bryant, Virginia Secretary of Natural Resources, December 29, 2009.

commitments for reductions from agricultural, stormwater, and septic sources. Almost uniformly, Bay states were unwilling or unable to commit to initiating regulatory or legislative changes necessary to update pollution controls.

As we said in our initial TMDL comments, NRDC supports the use of offsets to achieve timely load reductions. A number of state WIPs continue to heavily rely on offsets programs to achieve nutrient reductions from the stormwater sector. Reliance on this mechanism, through partially operational or undefined trading programs, raises serious “reasonable assurance” concerns. To date, programs in Pennsylvania and other Bay states have only handled a few trades. Clarification of baseline requirements and program design features will take some time before offset programs can be relied upon to accommodate significant new discharges. Therefore, particularly in the stormwater sector, it is important for Bay states to identify additional tools to accommodate growth beyond offsets.

With these uncertainties in mind, it is premature for EPA to accept as “reasonable” the assurances that future state-led offset trading programs will result in measureable and verifiable load reductions. While some allowance of a schedule for development and implementation of trading programs is reasonable, in fulfilling its obligations, EPA must also issue backstop adjustments of allocations where state WIPs are too speculative. Where WIPs include “[h]eavy reliance on trading to finance reductions and offset growth, but no commitment to adopt critical trading components such as clear baselines, liability, enforceability, tracking, and regulatory drivers” backstops are reasonable exercises of EPA’s responsibility to require “reasonable assurances” that pollutant loadings will be reduced to TMDL allocation levels.²

Finally, though doing so is not a necessary element of “reasonable assurance,” there are a number of areas where states throughout the watershed could benefit from broad dissemination of best practices. For example, elements of Maryland’s stormwater activities would prove helpful for states like Pennsylvania and Virginia. Virginia’s work on septic systems and CAFOs might be applied in West Virginia. EPA should assist states in identifying and disseminating standards and practices that are most effective in achieving the TMDL.

State Specific Concerns

MARYLAND

Maryland continues to express confidence that it will be able to achieve significant reductions in nitrogen and phosphorus loadings by the end of 2011 through achievement of the actions reflected in its first 2-Year milestone goals. However, as NRDC and CBF have previously pointed out, despite the State’s best intentions, its implementation rate currently falls far short of that required to meet these milestone deadlines. The revised WIP submitted by the Maryland Department of the Environment does not provide any indication that the state recognizes this shortcoming, and has identified explicit steps to improve performance in specific areas that are currently lagging. The accelerated milestone efforts described in the WIP show

² See Draft TMDL at pp. 8-6, 8-7.

improvements in funding and programmatic effort over 2008 levels; in order to demonstrate reasonable assurance that these milestones will in fact be met within the next twelve months, MDE needs to identify steps to improve performance over 2010 levels.

The updated implementation, gap closing approaches identified in Chapter 5 continue the draft WIP's narrative of staffing and funding commitments required and potential loading reductions, but do not commit the State to any firm, deliverable actions to improve implementation rates where necessary. With rare exception, the WIP fails to identify any contingency actions that Maryland will pursue should implementation of individual 2 Year milestones fall short. NRDC notes that Maryland's preferred path to achieving reductions from the agricultural sector continues to be through voluntary, cost-supported, and incentive programs. The state has yet to identify binding or enforceable options that will commit individual producers to BMP implementation or other measures to reduce discharges.

PENNSYLVANIA

Pennsylvania's WIP includes numerous improvements to the transparency of the overall plan. Detailed permitting information helps target resources to where they are needed the most. New information about air deposition control programs is also a positive contribution. However, the WIP continues to rely heavily on two approaches that are highly uncertain: adequate funding to implement existing state and federal programs and manage state permitting, and significant expansion of nutrient trading as a primary tool to achieve nutrient reductions from agriculture. NRDC supports the continued development of an interstate trading program but believes that additional strategies to achieve reductions from Pennsylvania's agricultural sector are necessary to provide reasonable assurance. The WIP also details a number of constraints for nonpoint project implementation (including a state legislative hurdle to funding of privately owned nonpoint source projects) that relate to PENNVEST's funding and structure. These appear to be concerns that can be addressed over time but they again raise the level of uncertainty around program eligibility, participation and rates of implementation and compliance.³

Pennsylvania's plan to reduce nutrients reductions from agriculture depends largely on expanded education and enforcement efforts to increase compliance with existing regulations. The plan also looks to investigate and invest in new technologies that reduce manure pollution. However, all of this depends on access to non-state funds because the state budget will not support additional staff positions to carry out these expanded programs. The WIP clearly states that "staff resources to support regulatory programs are not sufficient to assure compliance...there is no expectation that additional resources will become available in the near term."⁴ Since agriculture is the predominant source of nutrient and sediment loads in the state, more clarity about funding and enforcement strategies is necessary.

The plan is also particularly deficient with regard to stormwater controls. Pennsylvania intends to address growth in pollution from development and redevelopment primarily through

³ See PA WIP Evaluation at 183.

⁴ See PA WIP Evaluation at 73.

strong “no net increase” requirements and a requirement that runoff from redevelopment projects be reduced by an amount calculated as if 20 percent of the existing impervious surface conditions was considered to be meadow in good condition or better. While these are good goals, we continue to have concerns about the weak use of a narrative standard for MS4 permits which make it difficult for EPA to ensure that these goals will be met. The continued reliance on imprecise narrative standards frustrate the effectiveness of the proposed permits and regulations for new development and redevelopment projects.⁵ Furthermore, NRDC strenuously objects to Pennsylvania’s decision to calculate MS4 drainage area based solely on the surface area of roads within an urbanized area. This approach significantly underestimates the pollutant contribution from MS4 discharges and limits the range of response actions available to redress the effect of these permanent flows. EPA must insist that the Commonwealth abandon this approach, and fully account for and reduce urban stormwater discharges.

The WIP notes recommendations to provide incentives to facilitate redevelopment and reduction of impervious surfaces in existing urban areas. It is important that Pennsylvania continue to consider ways to increase and finance retrofits, as retrofits are almost certainly going to be necessary to accommodate growth and achieve the TMDL.

Finally, NRDC remains concerned with the Commonwealth’s approach to CAFOs and its large number of small dairies. The revised WIP refers to EPA’s concerns with the state’s existing CAFO program but specific regulatory revisions will not be made until the Commonwealth’s current General Permit expires in 2011.⁶ The WIP also indicates that small dairies will not be included in an expanded CAFO program. Pennsylvania must provide EPA with reasonable assurance that the cumulative impact of the thousands of small dairies in the state will be redressed through binding commitments implemented in a timely fashion according to prescribed schedules. In addition, we are troubled that, for purposes of Bay simulation modeling, Pennsylvania considers CAFOs as “zero dischargers” reflecting 100 percent implementation of all relevant BMPs; absent additional evidence of which we are not aware, we do not believe that the state’s is a credible way to estimate actual CAFO discharges.⁷

VIRGINIA

The revised WIP continues to rely on widespread implementation of a nutrient offset and trading program that will be expanded to include stormwater discharges from new development and redevelopment projects. However, the WIP offers only a vague description of how these mechanisms will be implemented and managed, leaving considerable uncertainty about such key components as how offset practices will be located as close to impact as possible, or how benefits will be verified and assured for perpetual function. Additionally, the WIP does not describe a plan to modernize local land use ordinances/codes to make sure they are consistent with

⁵ Pennsylvania relies on a narrative volume control standard that relies on managing the net change from pre-construction to post construction conditions for the 2-year storm event. *See, e.g.*, PA WIP at 120.

⁶ *See* PA WIP at p. 94.

⁷ *See* PA WIP at p. 46.

contemporary best practices such as green infrastructure or LID, though the WIP appears to recognize this as a potential problem.⁸

NRDC welcomes Virginia's newly described program to reduce existing effective imperviousness. However, this program is poorly defined in the WIP, leaving considerable uncertainty about its ultimate and overall effectiveness. For example, based on a reading of table 6-4 it is unclear whether the figure in the "Level 2 Practice % Coverage" column refers to the net area in the MS4 boundary where impervious cover reductions will be required. It appears as though the actual developed areas subject to the impervious cover reduction requirement constitute a relatively small portion of the total MS4 area. This level of effort compares poorly with the degree of impervious area retrofit required in and planned in Maryland communities. Also, allowance of 3 permit cycles (at least 15 years) to achieve these modest reductions is in tension with Clean Water Act requirements concerning MS4s. Virginia is not able to quantify the actual loading reductions expected to be realized through this program because all calculations, methods for accounting and verifying will be determined by each MS4 during the first cycle of their revised MS4 permits. Again, while any efforts to reduce impacts associated with existing impervious cover are welcome, the program described by Virginia does not reflect the level of best practice in the Chesapeake Bay watershed nor does it provide sufficient reasonable assurance that loadings from the MS4 sector will be sufficiently reduced to levels contemplated by the TMDL.

Finally, Virginia heralds its effort to issue new stormwater regulations as a significant gap closer tool, however, given the Virginia General Assembly's vote to stall issuance of the regulations until after the final TMDL, it remains unclear whether these temporarily stayed regulations will be subject to further revision (weakening) during final approval process.

WEST VIRGINIA

West Virginia's WIP reflects the sincere, best intentions of the state to make the significant amount of progress required to improve water quality protection across all sectors. However, the state's revised WIP contains few if any calculations to support any of the claimed reductions in non-point source loadings, and description of gaps in capacity, resources, and technical expertise show good intent but limited ability to deliver load reductions in concert with TMDL schedule.

West Virginia's new Phase II MS4 permit reflects laudable progress toward controlling and reducing stormwater discharges from new construction. On the other hand, the WIP contains no calculations to support the state's confidence that these measures will reduce baseline discharge conditions sufficiently to counter impacts caused by growth in non-MS4 areas (no support for "no net increase" assumption.) Additionally, the WIP also reveals that the state is not planning to undertake similar efforts to reduce existing discharges from urbanized areas, largely because of lack of "practice" with existing MS4s and those expected to be designated following the 2010 census. In order to address all significant sources of stormwater pollutants

⁸ VA WIP at 86.

within the state, EPA should expect that West Virginia commit to building MS4 capacity and initiating retrofit programs during the TMDL compliance timeframe.

The overwhelming majority of West Virginia's pollutant loadings come from the state's agricultural operations. However, programs to meaningfully reduce these discharges through regulatory or incentive-based programs lag significantly behind other states in the watershed. While the WIP's reliance on voluntary programs may be appropriate initially, this approach does little to accelerate implementation of BMPs or dramatically change practice levels within the TMDL timeframe. It's difficult to predict with certainty the effectiveness of these voluntary programs, especially because they rely on continued access to available funding. Furthermore, West Virginia has not committed to review and revise technical standards or adopt mandatory mechanisms to ensure and accelerate implementation. Unfortunately, the degree of uncertainty surrounding the effectiveness of these agricultural programs makes it difficult to find reasonable assurance that loads from this sector will be reduced to TMDL levels.

DELAWARE

Delaware's WIP brought substantial improvements in information and detail. Funding needs are clearly identified, particularly with regard to the agricultural sector, but it is not clear how many resources are likely to be secured. Additionally, there are no new regulatory or legislative changes identified with regard to this sector.

The wastewater sector is another area of continued concern. Several communities are identified as "facing significant financial hardship" if required to meet upgrade requirements to accommodate growth. The state indicates that it is seeking to identify additional places to conduct spray irrigation and that it may rely on an as-yet-undefined "credit exchange program," but both of these alternatives are too speculative to rely upon.

NEW YORK

Unfortunately, ongoing disagreements between EPA and the State of New York have delayed the preparation and submittal of a revised WIP from that state. NRDC anticipates that NY will take EPA's concerns over the draft WIP seriously, and respond correctively to the weaknesses in that document. In particular, NRDC remains alert to improvements which address the problems we have identified in our previous, generalized comments about the draft WIPs.

DISTRICT OF COLUMBIA

The District's revised WIP is generally very strong, with improvements in key areas to address previous shortfalls. A remaining source of concern is the unresolved status of federal payment of stormwater fees on federally owned property. The District's assumption that programmatic funds will remain steady depends on these payments, and without them, there is some considerable uncertainty about the extent and long-term viability of the District's stormwater control programs.

Conclusion

EPA and the Bay jurisdictions have done a tremendous amount of work identifying the load allocations and reduction strategies necessary to restore the Chesapeake Bay. NRDC applauds the efforts to date and encourages EPA to retain its essential enforcement role to ensure that the resources and efforts of the TMDL do not fail as other voluntary agreements have before. EPA must include sufficient backstop allocations in the final TMDL to support the states in developing concrete strategies to deliver on the promise of Bay restoration.

Respectfully submitted,



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